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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

E.I. DU PONT DE NEMOURS AND COMPANY,

Petitioner,

v.

BARBARA R. SHERIDAN,

Respondent,

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT IN THE CIRCUITS AND "HICKS" IS BEING PROPERLY APPLIED 3

CONCLUSION 9

TABLE OF AUTHORITIES

CASES: **PAGE**

Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir., 1997), petition for rehearing en banc pending. 3, 8

Ryther v. KARE 11, 1997 WL 94025 (8th Cir., March 6, 1997)(en banc), cert. petition filed *KARE 11 v. Ryther*, No. 96-1571, April 4, 1997..... 8

Sheridan v. E.I. DuPont De Nemours & Co., 100 F.3d 1061 (3d Cir. 1996)(en banc) 2, 3, 8

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) .....*passim*

STATEMENT OF THE CASE

Respondent, Barbara R. Sheridan, filed a complaint alleging intentional gender discrimination on the part of E.I. DuPont De Nemours and Company and Jacques Amblard in promotion, retaliation and constructive discharge. On each of these three counts, she proceeded on a pretext theory claiming that any legitimate non-discriminatory reason offered was unworthy of credence. She claimed that the key players in this dispute, Amblard and employees Dougherty and Maisel, were lying to cover up Amblard's intentional gender discrimination.

The promotion claim stemmed from a failure to promote or even consider promoting Barbara to be manager of restaurants at the Hotel DuPont, a four star restaurant in Wilmington, Delaware. The retaliation claim arose from challenged disciplinary actions and the fact that Respondent was placed on probation after she complained to Amblard about his failure to promote her based upon her gender. The constructive discharge claim arose four months after Barbara had complained to Amblard about not being promoted due to her gender when, on February 26, 1992, she was accused of the crime of stealing. Her accusers based this spurious claim on a written dated listing allegedly provided by a male bartender, Mr. Dougherty, who eventually replaced Respondent. However, Barbara was on jury duty on five of the dates listed, and her immediate supervisor, Mr. Maisel, in his own handwriting admitted that another head captain was scheduled to work Respondent's shift on seven different dates at issue. Respondent then was offered three demeaning jobs after Amblard and other supervisors conducted a public investigation into her alleged stealing activities. Given these facts, Respondent's only logical course of action was to resign and file a lawsuit to clear her name.

From April 26 until May 3, 1994, a six day trial took place, involving 24 different witnesses. After deliberations the jury returned special interrogatories and found that Barbara was constructively discharged *solely* because of gender. Petitioner then moved for judgment as a matter of law and a new trial and began to advance the argument that the *Hicks* doctrine was a dramatic and hurtful change in the law for employers and that something more than the prima facie case coupled with evidence of mendacity and pretext was necessary to prove intentional discrimination. The district court agreed and disregarded the jury's verdict in a mendacity case and entered judgment in favor of DuPont and Amblard as a matter of law, and also granted a new trial in the alternative.

A Third Circuit panel disagreed that *Hicks* was dramatically adverse to employers and ruled for Respondent. That Court then also ruled en banc for Respondent by a 10 - 1 vote and held that -

> [W]e have understood *Hicks* to hold that the elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination.

App. 13a, *Sheridan v. E.I. DuPont De Nemours & Co.,* 100 F.3d 1061, 1066-67 (3d Cir. 1966)(en banc). But Petitioner herein has continued to advance the argument that in order to protect employers something more than this is needed in the paradigm for intentional discrimination in a pretext case.

SUMMARY OF ARGUMENT

Petitioner has constructed its argument that a split in the Circuits exists by relying upon dicta from First and Fifth Circuit cases, which are just that -- dicta. But if the cases are analyzed there are no circuit holdings contrary to the rule of

law carefully articulated in *Sheridan*. The Eleventh Circuit recently addressed this question in detail and it agrees that all the Circuits are appropriately interpreting *Hicks* and that they are not applying any hurtful statement of the law to employers. *Combs v. Plantation Patterns,* 106 F.3d 1519, 1534-38 (11th Cir., 1997), petition for rehearing en banc pending. Thus, it is premature to grant certiorari since the clear trend is for the courts of appeals to read *Hicks* correctly. At least until there is a contrary holding from another circuit, the Court should not grant certiorari.

ARGUMENT

I. THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT IN THE CIRCUITS AND "HICKS" IS BEING PROPERLY APPLIED.

This case was correctly decided by the en banc Third Circuit applying the proper legal principles. This was a hotly contested pretext case that was ultimately decided on credibility and the jury's determination of which version of the events to believe. Respondent coupled her prima facie case with evidence of pretext which permitted the jury to infer intentional gender discrimination because its disbelief was coupled with strong evidence of mendacity. On a direct challenge to this paradigm for proving discrimination the Third Circuit correctly applied this Court's precedents for circumstantially proving discrimination. Petitioner's present argument also is based upon a straw man. The Third Circuit did not hold that evidence of pretext automatically entitles a party to a verdict but that evidence of pretext, coupled with the elements of the prima facie case, will permit a jury to infer discriminatory intent, particularly if there is evidence of mendacity.

Factually, after the jury verdict below the evidence has to be considered in the light most favorable to the prevailing party, assuming that all conflicts of the evidence were resolved in favor of the Respondent, assuming as proven all

facts that the prevailing party's evidence tended to prove, and giving the prevailing party the benefit of all favorable inferences that may reasonably be drawn from the facts proven. Viewed in this light, Respondent was a capable, ambitious employee who was being held down by her supervisor. But for one year that supervisor was removed and a division of DuPont ran her Hotel. Respondent then received the recognition she deserved, numerous raises, promotions, a bonus and other acknowledgements. But in the second quarter of 1991, that division moved on and Amblard, her former supervisor, again assumed responsibility. Non-recognition of Barbara's achievements returned. Respondent came back from vacation and then learned that five males and no females had been considered for a non-posted promotion. She said that was enough and complained of gender discrimination. That supervisor then peppered the file with false postdated documents to drive her out because of her complaints of his gender discrimination.

This then became a "pretext" case, replete with mendacity, where the jury's determination of credibility was crucial. Respondent attacked numerous contradictions, inconsistencies and weaknesses in the employer's non-discriminatory reasons to show that they were unworthy of belief and she coupled this with her prima facie case to permit the jury to infer intentional discrimination if it was convinced that the evidence of mendacity in the record was sufficient to show intentional discrimination.

The jury was offered evidence of pretext in almost 20 categories, including:

(1) The proverbial smoking gun, which included a written list of allegedly stolen drinks by date which was disproved since Respondent was either serving on jury duty in State Court or was scheduled off on those dates. The male author of

that document was rewarded for its fabrication and replaced Respondent in her job. 7, 31-33a.

(2) Her supervisor's written contention, in a falsified document, that Respondent had attended a meeting on a date certain was contradicted by his own handwritten work schedule which showed that the other document was fabricated since she was not working on that day. 7, 33a.

(3) Claims that staff complained about Respondent were contradicted by another supervisor's truthful admission that the staff did not complain about her. 76a.

(4) Numerous witnesses were impeached by prior inconsistent sworn testimony. 33-34a.

(5) Oral testimony was impeached by prior written documentation. 31-33a.

To use an analogy, to enable the jury to understand the play on the basis of its entire performance, and not just upon certain scenes alone, evidence of pretext was coupled with the prima facie case and other gender related evidence to indicate that gender was a motivating factor in the decision. The overall scenario indicated that:

(1) Respondent was replaced by a male who had fabricated the stealing charges against her. 8, 127a.

(2) Five males and no females were considered for the unposted promotion at issue. 32a.

(3) The number of female head captains decreased while the number of male head captains increased. 8, 28a.

(4) Three times in September and October, Respondent complained directly to Amblard about his treatment of her due to her gender. When faced

with these accusations he refused to deny them and instead an investigation of her began. 32a, 77a.

(5) Finally, in the presence of other male supervision Amblard would not speak to Respondent, a female. 8, 33a.

In light of this and other evidence, the Third Circuit articulated and applied the appropriate legal principle, set out verbatim at page 2 above, which permits the jury, if it finds sufficient evidence of mendacity, coupled with the prima facie case, permissively to draw an inference leading it to conclude that there was intentional discrimination. To quote this Court's ruling in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993),

> the trier of fact proceed[ed] to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [the plaintiff]". The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required."

Id. at 511 (citations omitted). That ruling was correctly articulated and applied herein.

In further clarification of the analysis necessary to prove discrimination circumstantially, and in order to resolve a split in authority among the federal circuits, the Court in

Hicks considered "whether, in a suit against an employer alleging intentional racial discrimination in violation of [Title VII], the trier of fact's rejection of the employer's asserted reasons for its actions *mandates* a finding for the plaintiff." *Id.* at 504. The Court held that a factfinder need not rule for the plaintiff, even though it disbelieves the reasons offered by the defendant, if the plaintiff has not established that race or some other protected classification was what motivated the employer's action. *Id.* at 518-19. The Court resolved that at trial the plaintiff in a discrimination case must "convince the factfinder *both* that the [employer's proffered] reason was false, and that discrimination was the real reason" for the decision about which the plaintiff complains. *Id.* at 515. While noting that rejection of the defendant's proffered reasons does not compel judgment for the plaintiff, the Court held that evidence of disbelief together with the earlier evidence presented to establish the prima facie case can carry the plaintiff's burden, particularly if accompanied by the suspicion of mendacity. *Id.* at 511. "The defendant's `production' (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven `that the defendant intentionally discriminated against [him]'..." *Id.* at 511. "Even though...rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination." *Id.*

Accordingly, as the Third Circuit correctly explained, the holding in *Hicks* is that a plaintiff is not entitled to judgment as a matter of law simply because she proves her prima facie case and shows that the employer's proffered reasons for the adverse action are false. But she may prevail under such circumstances through submission of her case to the ultimate factfinder. Contrary to Petitioner's argument, a plaintiff need not produce additional evidence of discrimination beyond her prima facie case and evidence of pretext in order to prove intentional discrimination. *Id.* That, of course, was the holding

of the Third Circuit which it correctly applied to the present case. 13a, 100 F.3d at 1066-67.

Petitioner's contention that the circuits are split is simply erroneous and the Third Circuit correctly analyzed the case law in this regard. 15-17a. The argument over a split in the circuits is just a straw man. The Third Circuit did not hold that evidence of pretext *automatically* entitles a plaintiff to a jury verdict but only that evidence of pretext, coupled with the elements of the prima facie case permits a jury to infer discriminatory animus, especially if joined with evidence of mendacity. Moreover, since the *Sheridan* decision the Eighth Circuit en banc also has followed *Sheridan*'s statement of the law which is quoted at page 2 above. *Ryther v. KARE 11,* 1997 WL 94025 *4 (8th Cir., March 6, 1997)(en banc), cert. petition filed *KARE 11 v. Ryther*, No. 96-1571, April 4, 1997.

Aside from its straw man claim that a verdict is "automatic," Petitioner has constructed its argument that a split exists by relying upon dicta from First and Fifth Circuit cases, which are just that -- dicta. But if the cases are carefully analyzed there are no circuit holdings contrary to the rule of law articulated in *Sheridan*. The Eleventh Circuit fully addressed this question in detail recently. It agreed that nine Circuits are appropriately applying *Hicks* and that no Circuit has made any dramatic or hurtful mis-statement of the law with regard to employers. *Combs v. Plantation Patterns,* 106 F.3d at 1534-38. Only dicta in the First and Fifth Circuits clouds this picture, but the actual holding in those cases is in complete accord with *Hicks*. *Id.* Thus, it is premature to grant certiorari since the courts of appeals have read *Hicks* correctly. Until there is a contrary holding from another circuit, this Court should not consider granting certiorari. Any dicta in the circuits should be left to self correction as the weight of authority on *Hicks* continues to accumulate.

Counsel is aware that another certiorari petition relating to *Hicks* was filed on April 4th in *KARE 11 v. Ryther*, No. 96-

1571, appealing an en banc decision of the Eight Circuit upholding *Hicks* principles. If after considering both cases the Court should determine that there is a conflict in the circuits which merits a grant of certiorari, counsel agrees that the present case is well presented and an appropriate vehicle to resolve such conflict.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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